No. 219

No. 13,219.

United States Court of Appeals

FOR THE SIXTH CIRCUIT.

LIBRARY
SUPREME COURT, U. S.

FRANK CUIKSA,

Plaintiff-Appellant,

vs.

THE CITY OF MANSFIELD, *et al.*,

Defendants-Appellees.

CIVIL ACTION No. 30,569.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

BRIEF AND APPENDIX OF APPELLANT.

H. M. RUST,
Richland Trust Bldg.,
Mansfield, Ohio,
Attorney for Appellant.

LESLIE R. ULRICH,
ROBERT F. LEE,
JAMISON, ULRICH, HOPE, JOHNSON & BURT,
National City Bank Bldg., Cleveland, Ohio,

ROBERT E. MABEE,
Farmers Bank Bldg., Mansfield, Ohio,

LYDON H. BEAM,
BEAM & BEAM,
Richland Trust Bldg., Mansfield, Ohio,
Attorneys for Appellees.

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STATEMENT OF QUESTIONS INVOLVED.

(1) Is a municipality liable, as a part of the State, under Title 42, Section 1983 U. S. C. A. to the individual injured, when it deprives him of the right to liberty secured to the individual under the Constitution and laws of the United States, by suit of the individual under the statute?

The District Court impliedly answered this question "No." The appellant, Frank Cuiksa, contends that it should be answered "Yes."

(2) Is a state judge liable for depriving an individual of the rights secured to the individual by the Constitution and laws of the United States, by action under Statute Title 42, Section 1983 U. S. C. A.?

The District Court impliedly answered this question "No." The appellant, Frank Cuiksa, contends that it should be answered "Yes."

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No. 13,219.

United States Court of Appeals

FOR THE SIXTH CIRCUIT.

FRANK CUIKSA,

Plaintiff-Appellant,

vs.

THE CITY OF MANSFIELD, *et al.*,

Defendants-Appellees.

CIVIL ACTION No. 30,569.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

Appellant brought an action against the City of Mansfield, where he had been arrested under a void ordinance and accepted into its jail without due process of law, and Glenn W. Marriott, the Judge of the Municipal Court of Mansfield, who conducted a trial which convicted appellant without due process of law, under the Civil Rights Act, formerly Title 8 U. S. C. A. 43, now Title 42 U. S. C. A. 1983; motions for summary judgment of defendants claiming sovereign immunity and judicial immunity were filed and sustained by the District Court upon authority of *Kenny vs. Fox,* 232 Fed. 2nd 288. This appeal results.

The City of Mansfield is a Municipal Corporation of the State of Ohio (3a); that it accepted and held appellant in its prison without process or commitment (4a) which

was not fit for human occupancy (4a); and this was done under a void ordinance, Section 200 (4a), which is not within the power of the city to enact, and which is vague and uncertain and does not give notice to the citizen of what is commanded or forbidden (4a, 9a, 10a).

Glenn W. Marriott is the Judge of the Municipal Court of Mansfield (3a). The appellant was arrested or seized on November 6, 1950, without any warrant for a claimed misdemeanor under this void ordinance; he was not taken before any magistrate but incarcerated in the Mansfield City Prison after being struck and pushed around, his demands for a doctor being refused (4a, 10a, 14a).

On November 7, 1950, an affidavit was filed in Municipal Court, under Section 200 of the ordinances of the City of Mansfield, and which did not set forth any facts constituting a crime. No notice of what he was charged with was furnished appellant; no warrant was issued, executed or returned (5a).

Appellee Marriott called upon him to plead without any warrant being returned, who berated him for not pleading guilty and informed him that he could not win a case in his Court (12a, 15a). A jury was impanelled illegally, and the challenge to the array of jurors was overruled (52, 11a, 12a). The witnesses were required to give their opinions of the guilt of the appellant to the jury and to usurp the function of the jury in determining the facts and innocence of the appellant (5a).

Appellee Marriott did not charge as to drunken behavior, but did charge that it is enough if he is so far affected as to render him unfit and disqualified for the performance of ordinary callings—then giving a list of skilled and professional acts, such as prescribing as a physician, or the giving of advice as a lawyer (6a), there

was no evidence that he was competent to do any of these things when sober.

Appellant was subjected to two jury trials, covering four trial days and fined $50.00 and costs.

Appellant was deprived of many things retained by him under the Constitution, to his injury (5a, 9a, 13a, 14a).

ARGUMENT.

(1) Is a municipality liable, as a part of the State, under Title 42, Section 1983 U. S. C. A. to the individual injured, when it deprives him of the right to liberty secured to the individual under the Constitution and laws of the United States, by suit of the individual under the statute?

The District Court impliedly answered this question "No." The appellant, Frank Cuiksa, contends that it should be answered "Yes."

Is the state and its municipalities included in the term "every person" as used in the Civil Right Statute, Title 42, Section 1983, when it, by its own acts, deprives an individual of his right to liberty in violation of the Constitution and laws of the United States?

The record shows that this action resulted from an imprisonment upon an ordinance which was void for want of compliance with the laws of the State of Ohio, and not within the powers granted to the municipality, and which was too vague to define a crime.

The record shows that the City incarcerated this appellant without any process or writ from any committing magistrate, and solely on the direction of the arresting officer, in its prison which was kept in foul condition, and no warrant was ever served.

Title 42, U. S. C. A. 1983, formerly Title 8, Section 43, reads as follows:

> "§ 1983: *Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Whether the term "every person" includes the state and its subdivisions depends on its legislative environment. *Ohio vs. Helvering*, 292 U. S. 360; *Georgia vs. Evans*, 316 U. S. 159.

"The consent of the state to suit is not requisite in each case. It may be given in a general law. By being one of the United States, the state has surrendered the sovereign right of judging in every case on the justice of its own pretensions, when the action arises under the Constitution and laws of the United States." (*Cohen vs. Virginia*, 19 U. S. 264.)

Congress was authorized to enact this statute by the Fourteenth Amendment; the pertinent parts of which read as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Only states are mentioned in this amendment, as being prohibited in these actions as to the subject matters included in it.

Congress has power to give an action for damages to an individual who suffers by breach of the law. *United States, ex rel. Marcus vs. Hess*, 317 U. S. 537; *Chattanooga Foundry vs. Atlanta*, 203 U. S. 390. By the Civil Rights Act, Congress has given an action against the states and their subdivisions in favor of the injured individual when they violate the Constitution and laws of the United States securing the rights retained by him as an individual to his injury. This is the only method Congress has provided for enforcement of the Constitution against the States.

Enforcement of the prohibition of this amendment is no invasion of state sovereignty, as no law can be, which the people of the state have, by the Constitution empowered Congress to enact. *Ex parte Virginia*, 100 U. S. 346; *U. S. vs. Patrick*, 54 F. 338; *Smoot vs. Kentucky, Cent. R. Co.*, 13 Fed. 337. This conduct being prohibited by the Amendment, it cannot be considered as a governmental function of the state; it is forbidden conduct.

The prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. Such cases are not controlled by *Erie Railroad vs. Tompkins*, 304 U. S. 64; when a federal statute condemns an act as unlawful the extent and nature of the legal consequences are federal questions, to which conflicting state law and policy must yield. *Sola Electric Co. vs. Jefferson Elect. Co.*, 317 U. S. 173; *McCullough vs. Maryland*, 4 Wheat. 316.

None who act under the color of the law are beyond the reach of the Constitution; *W. V. Board of Education vs. Barnette*, 319 U. S. 64. The equity jurisdiction under the Civil Rights Act is often exercised against the state and its subdivisions and sustained, under these statutes; here relief is being asked against the appellees under both law and equity.

The sovereign powers of the state is necessarily diminished to the extent of the grants of power to the Federal Government in the Constitution, and sovereignty cannot be claimed in an action given by Congress involving the state, *U. S. vs. California*, 297 U. S. 175.

(2) Is a state judge liable for depriving an individual of the rights secured to the individual by the Constitution and laws of the United States, by action under Statute Title 42, Section 1983 U. S. C. A.?

The District Court impliedly answered this question "No." The appellant, Frank Cuiksa, contends that it should be answered "Yes."

The record shows that appellee Marriott was entirely without jurisdiction, the ordinance was void, the affidavit void, no statutory notice was given to appellant, no warrant being executed or returned, the jury was not a legal jury, the evidence usurped the functions of the jury, and upon a charge which gave the jury no standard of conduct from which a crime could be determined.

A state judge is bound to obey the Constitution and laws of the United States, Art. 6, Cl. 2, Constitution, and a judgment rendered in violation of Art. 6, Cl. 2, is a nullity and subject to collateral attack and the state judge may be liable therefor. *Kalb vs. Feuerstein*, 308 U. S. 433.

The entire proceeding in the state trial is void for want of due process of law. Judge Marriott did not have jurisdiction for want of any subject matter, the ordinance being void, no charge could be made under it. Judge Marriott did not have jurisdiction over the person of this appellant, for the want of any process at all, in the state of Ohio judicial due process commences when the accused is taken before a court and a warrant has been returned. The essential part of R. C. 2937.02 formerly G. C. 13433.1 reads:

> "When an accused is taken before a court or magistrate and a warrant has been returned, such court or magistrate shall inform him of the charge against him and of his right to have counsel, and with the consent of the accused, may proceed forthwith to examine into the merits of the charge." * * *

No principle of procedural due process is more clearly established than that notice of the specific charge and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. *Re Oliver*, 333 U. S. 257-273; *Powell vs. Alabama*, 287 U. S. 45; *Cole vs. Arkansas*, 333 U. S. 196-200; *Cooke vs. U. S.*, 267 U. S. 274.

When the statutes in Ohio are obeyed by the judges and officers of the state, they are probably adequate to meet the minimum requirement of due process in misdemeanor cases, and satisfy the prohibition of the 14th Amendment.

A police officer cannot lawfully incarcerate a person in Ohio, the person must be immediately taken before a court or magistrate having jurisdiction, a complaint made, a warrant issued, if the arrest is on view the warrant can

be issued only by the judge or magistrate, and the accused is then served with the warrant, and has an opportunity to provide bail, and is substantially in accordance with the common law, when complied with.

R. C. 2935.03, formerly G. C. 13432-1:

"A sheriff, deputy, marshal, deputy marshal, watchman, or police officer shall arrest and detain a person found violating a law of this state, or an ordinance of municipal corporation, until a warrant can be obtained." * * * .

R. C. 2935.05, formerly G. C. 13432-3:

"When a sheriff, deputy sheriff, marshal, deputy marshal, watchman, or police officer has arrested a person without a warrant, he must, without unnecessary delay, take the person arrested before a court or magistrate having jurisdiction of the offense, and must make or cause to be made before such court or magistrate a complaint stating the offense for which the person was arrested."

R. C. 2935.11, formerly G. C. 13432-9:

"When an affidavit charging a person with the commission of an offense is filed with a judge, clerk, or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused." * * *

In Ohio, the warrant is the only written notice to the accused of the charges he is to answer, and upon its execution and return the only pleading upon which the jurisdiction of the court is invoked.

R. C. 2935.20, formerly 13432-19:

"A warrant shall contain a copy of the affidavit inserted therein, or annexed thereto, or shall recite the substance of the accusation and command the officer to whom issued, forthwith, to take the accused

and bring him before the magistrate or court issuing such warrant, or other magistrate of the county having cognizance of the case, to be dealt with according to law. The following form of warrant is sufficient." * * *.

In the case here, no warrant was ever issued, executed, and returned; no notice was given to the citizen of what he was charged with, and the jurisdiction of the court never invoked, and the matter unlawful from the beginning and continues to be unlawful.

There are many cases brought under the Civil Rights Act and dismissed, either because the subject matter or the facts do not bring them within the statute or the scope of the amendments. Such cases are a matter of state concern only, some involve detention under the lunacy laws, it is traditional that the state can extend its protection and benefits to these persons, for their protection and welfare, and this without due process of law under the 14th Amendment. *Maxwell vs. Maxwell*, 10 A. L. R. 482; *Crawford vs. Brown*, 45 A. L. R. 1457; but liability may arise as a state matter when the charge is false and the state procedure has not been observed. *Beckham vs. Cline*, 145 A. L. R. 705.

Such a case is *Kenny vs. Fox*, 232 Fed. 2nd 288, where the court upheld the dismissal upon the basis of no cause of action and then entered upon a discussion of the doctrine of judicial immunity, being of the firm opinion that the common law rule of immunity of a judicial officer for acts done in the exercise of his judicial function, where he has jurisdiction over both parties and the subject matter, has not been abrogated by the Civil Rights Act.

Much reliance is placed on the decision of *Tenny vs. Brandhove*, 341 U. S. 367, wherein the Supreme Court

held that no cause of action was plead, as the acts were within the sphere of legitimate legislative activity, the court further says:

"This court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Kilbourn vs. Thompson*, 103 U. S. 168, 26 L. Ed. 377; *Marshall vs. Gordon*, 243 U. S. 521, 61 L. Ed. 881; 37 S. Ct. 448, L. R. A. 1917 F. 279, Am. Cases 1918 B 371; compare *McGrain vs. Daugherty*, 273 U. S. 135, 176, 71 L. Ed. 580, 593, 47 S. Ct. 319, 50 A. L. R. 1.

It appears that state matters not within the Federal Constitution are controlled by state law which may grant immunity, but that there can be no immunity in matters within the Federal Constitution. It is a familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or common law rules. *Sola Electric Co. vs. Jefferson Electric Co.*, 317 U. S. 173.

Enforcement of the 14th Amendment is within domain of Congress, even though it restricts state power. The Constitution now expressly gives authority for Congressional interference and compulsion in the cases embraced within the 14th Amendment. We do not perceive how holding an office under a state and claiming to act for the state can relieve the holder from obligation to obey the Constitution of the United States or take away the power of Congress to punish his disobedience. *Ex parte Virginia*, 100 U. S. 346. This case destroys any claim of judicial immunity for matters within the Federal Constitution, for the state judge sought his release from a criminal charge under the Civil Rights Act under the claim of immunity.

This was followed in *Pickings vs. Penna. R. R. Co. et al.*, 151 Fed. 2nd 240, which held state judges to be within the term "every person" as used in the statute and liable under the Act.

This court affirmed a judgment against a state judge, and defined when a judge was liable in *Manning vs. Ketchum*, 58 Fed. 2nd 948.

Kenny vs. Fox, can have no application in cases based upon the entire absence of jurisdiction over either the subject matter or the person of the defendant in the state court.

State court determinations cannot preclude the Federal Courts from determining federal questions, and the state courts need not be exhausted, and this action is a federal remedy. *Lane vs. Wilson*, 307 U. S. 268, *Burt vs. N. Y.*, 156 Fed. 2nd 791.

Wherefore, the order of dismissal of the District Court should and ought to be set aside and reversed.

RELIEF.

It is respectfully urged that the judgment of the District Court dismissing this action as to the Appellees be reversed and the action mandated to said court with instructions to overrule the Motions for Summary Judgment of these Appellees, and for further proceedings according to law.

Respectfully submitted,

H. M. Rust,

Attorney for Appellant.

CIVIL ACTION No. 30,569.

In the United States District Court

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

FRANK CUIKSA,

Plaintiff,

vs.

THE CITY OF MANSFIELD, GLENN W. MARRIOTT, EDWARD G. VARGA, LAWRENCE HARPER, ALBERT O'NIEL and RICHARD TURNER,

Defendants.

RELEVANT DOCKET ENTRIES.

10/1/53. Complaint filed.

10/1/53. Summons issued. 6 copies of summons with copies of complaint issued to U. S. Marshal.

10/21/53. Summons retn. & filed. Served City of Mansfield, Ohio, Glenn W. Marriott, Edward G. Varga, Lawrence Harper, Albert O'Niel, and Richard Turner 10/19/53. Fees $27.00.

1/15/54. Motion for more definite statement with brief by defendant filed. Copy mailed 1/15/54.

3/4/54. Memorandum of opinion filed, Jones, J. (motion is denied) Copies to counsel.

3/8/54. Order that defendants' motion for a more definite statement is hereby denied filed. Jones, J. Noted 3/8/54. Copies to counsel.

6/8/54. Answer of Glenn W. Marriott filed. Copy mailed 6/8/54.

6/8/54. Answer of Edward G. Varga, Lawrence Harper, Albert O'Niel, and Richard Turner filed. Copy mailed 6/8/54.

6/8/54. Answer of City of Mansfield filed. Copy mailed 6/8/54.

11/12/54. Interrogatories of defendants filed. Copy served 11/11/54.

12/31/54. Answers to Interrogatories of Defendants by the Plaintiff filed. Copy mailed 12/30/54.

6/23/55. Deposition of Frank Cuiksa on behalf of defendant filed. Fees $49.75.

9/9/56. Request for trial filed.

9/7/56. Motion of the deft. City of Mansfield for Summary Judgment under Rule 56 filed. Copy mailed 9/7/56.

9/7/56. Brief in support of the above motion filed. Copy mailed 9/7/56.

9/7/56. Motion of the deft. Glenn W. Marriott for Summary Judgment under Rule 56 filed. Copy mailed 9/7/56.

9/7/56. Brief in support of the above motion filed. Copy mailed 9/7/56.

10/27/56. Brief of plaintiff opposing motion of City of Mansfield for summary judgment filed. Copy mailed 10/26/56.

10/27/56. Brief of plaintiff opposing motion of defendant Marriott for summary judgment filed. Copy mailed 10/26/56.

11/27/56. Motion of defendant Glenn W. Marriott for leave to file supplemental and reply brief in support of his motion for summary judgment filed. Copy mailed 11/27/56.

11/27/56. Motion of defendant The City of Mansfield for leave to file supplemental and reply brief in support of its motion for summary judgment filed. Copy mailed 11/27/56.

12/31/56. Brief in opposition of motion for leave of The City of Mansfield filed. Copy mailed 12/28/56.

12/31/56. Plaintiff's brief in opposition to defendant Glenn W. Marriott's motion for leave to file supplemental and reply brief filed. Copy mailed 12/28/56.

2/1/57. Endorsed ruling granting Motion of deft. City of Mansfield for leave to file supplemental brief, Connell, J.

2/1/57. Endorsed ruling granting Motion of deft. Marriott to leave to file supplemental and reply brief, Connell, J.

2/1/57. Endorsed ruling granting motion of deft. Marriott for summary judgment, Connell, J. Copies to counsel.

2/1/57. Endorsed ruling granting motion to deft. City of Mansfield for motion for summary judgment, Connell J. Copies to counsel.

2/1/57. Reply brief of deft. The City of Mansfield in support of its motion for summary judgment filed. Copy mailed 2/1/57.

2/1/57. Reply brief of deft. Glenn W. Marriott in support of his motion for summary judgment filed. Copy mailed 2/1/57.

2/6/57. Order granting motions of defendants Marriott and City of Mansfield for summary judgment and dismissing complaint as to said defendants filed, Connell, J. Noted 2/6/57. Copies to counsel.

3/4/57. Notice of Appeal filed. Copies mailed to counsel; Beam and Beam, and Jamison, Ulrich, Hope, Johnson & Burt.

3/4/57. Bond on Appeal filed (Cash).

COMPLAINT.

(Filed October 1, 1953.)

1. The plaintiff says that jurisdiction of this action is conferred upon this Court, by 28 F. C. A. 1343, 8 F. C. A. 42, 43, 47 and 48.

2. That the City of Mansfield is a Municipal Corporation, existing under the laws of the State of Ohio, Glenn W. Marriott is the duly, qualified and acting Judge of the Municipal Court of Mansfield, Edward G. Varga, Lawrence Harper, Albert O'Niel and Richard Turner are members of the Mansfield Police Department.

3. That the City of Mansfield has enacted and is enforcing the following ordinance:

> "Section 200. It shall be unlawful for any person to disturb the peace and good order of this City by unusual and unnecessary noise, or riotous, drunken or disorderly behavior or wrangling or quarreling."

4. That the City of Mansfield enacted such ordinance under the power delegated to Municipal Corporations by Section 3664 of the General Code of Ohio, and does not comply with such delegation of power, by requiring the intoxication or drunkenness to be in the streets and other public places to the annoyance of the citizens, and is beyond the scope of the powers delegated to Municipal Corporations.

5. That said ordinance is vague and uncertain using language of no determinative meaning, and which is not known to the law, and does not inform the citizen as to what is commanded or forbidden, and is not sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties.

6. That on or about November 6, 1950, the plaintiff was arrested and seized by the defendants, Edward G. Varga, Lawrence Harper, Albert O'Niel and Richard Turner, acting as police officers without any warrant or process, for a claimed misdemeanor not committed in their presence, who beat, tortured, and jerked plaintiff about, and removed him to the Mansfield City Prison, a foul, noisome, loathsome and unsanitary place, not fit for human occupancy.

7. That said police officers did not take the plaintiff before a magistrate and obtain a warrant, but held him at said prison, where they searched, and shook him down, and threw him into a cell, the plaintiff demanded a doctor to care for and examine him, which demand was refused.

8. That on or about November 7, 1950, the following affidavit was filed in the Municipal Court of Mansfield by the defendant Edward G. Varga:

Before me, J. L. Fankhouser, Clerk of the Municipal Court, personally came Edward G. Varga, who being duly sworn, according to law, makes oath and says that on or about the 6th day of November, 1950, that one Frank Cuiksa, late of said City and County aforesaid, did violate, Section 200, Chapter 14, Ordinance 72, of the Revised and Codified Ordinances of the City of Mansfield, Ohio, in the manner and form following, to wit: Disturbing the peace and good order of the City by drunken behavior.

EDWARD G. VARGA.

That said affidavit does not set forth any facts constituting a crime, and no warrant was issued, executed and returned thereon.

9. That said Glenn W. Marriott, as judge of the Municipal Court of Mansfield, acting whimsically, arbitrarily and without jurisdiction in the premises, ordered the Clerk of the Court, by a Journal Entry, to list, impanel and subpoena a jury from Richland County, rule or rules of Court to the contrary notwithstanding, and which violated G. C. 13443 and/or G. C. 1579-997 and which juries were challenged as not being lawful juries, which challenge was over-ruled.

10. That said Glenn W. Marriott, as such judge of the Municipal Court of Mansfield, permitted and required; over the objections of this plaintiff, the police officers to give their opinions of the guilt of this plaintiff, and to usurp, supplant and abrogate, the function of the jury in determining the facts and innocence of the plaintiff from the testimony of the witnesses.

11. That the said Glenn W. Marriott, as such judge, over the objections of the plaintiff submitted the case to said jury without any evidence of the commission of any crime.

12. That the said Glenn W. Marriott, as such judge, then without giving the jury any charge or instructions as

to the requirements of the law as to drunken behavior, then proceeded to charge and instruct the jury in part as follows:

"A person may be said to be intoxicated when he is so much under the influence of intoxicating liquor that he is unfitted and disqualified from attending to and performing the usual duties and business of life."

* * * * *

"In order to be intoxicated, it is not necessary that the person should be so drunk as to be wholly without the ability to think or move; it is enough if he is so far affected as to render him unfit and disqualified for the performance of ordinary callings—so affected that it would be unsafe to trust him with the driving of a team, the care of a mill, the making of a contract, or the sale of property, with the steering of a steamboat, with the prescribing as a physician, or the giving of advice as a lawyer. A person so affected by intoxicating liquors is truly in a state of intoxication and can truly be said to be intoxicated."

"A person is also said to be under the influence of intoxicating liquor or to be drunk when some physical function or sense has been impaired by the use of drugs, alcohol, or other means by which the mental, physical, or both mental and physical functions of the body have been affected or impaired whereby he is rendered less able to perform the usual mental and physical functions of mind and body to the extent that his ability to think or act has rendered him unfit and disqualified from the performance of ordinary callings, such as doing the things and acts heretofore given you by the court."

13. That the defendant, Glenn W. Marriott, as such judge without jurisdiction in the premises, subjected this plaintiff to four (4) days of trial, before two different juries, and upon the second jury convicting the plaintiff, subjected him to a fine of $50.00, and court costs, and the case was then reviewed in the Courts of Ohio, until about

the 25th day of September, 1953, when such appeal was dismissed by the Court of Appeals of Richland County, Ohio, at the costs of this plaintiff including the bill of exceptions and attorney fees.

14. That this plaintiff has suffered serious injuries and disabilities from servicing in the armed services of the United States; and will upon his confinement in the Mansfield City Prison; a foul, noisome, unsanitary and loathsome place, unfit for human occupancy, require surgical, medicial, and hospital care and attention as well as police protection, which by the customs and usage of said City, will be refused and denied him by said City.

15. That all the acts of the defendants were wilful and malicious, and under the pretense and color of the statutes of Ohio, the Ordinance of the City of Mansfield, and the regulations of the Municipal Court of Mansfield, and all occurred in Mansfield, Richland County, State of Ohio, and subjected or caused to be subjected, the plaintiff a Citizen of the United States to the deprivation of his rights, privileges, immunities, liberty secured to him by the Constitution and laws of the United States.

Wherefore Plaintiff demands:

1. A trial by jury.

2. That ordinance Section 200, Chapter 14 of the City of Mansfield, be set aside as void and held for naught.

3. That the affidavit against this plaintiff filed in the Municipal Court of Mansfield, be set aside as insufficient, in not stating any crime and being void.

4. That the judgment of conviction of this plaintiff be set aside and held for naught, for want of jurisdiction of said Court to entertain the action.

5. That the judgment of conviction of this plaintiff be set aside and held for naught, for want of jurisdiction of the Municipal Court of Mansfield to make and enter said judgment.

6. That said City be required to furnish a sanitary prison fit for human occupancy, with police protection for this plaintiff before he is confined therein.

7. That said City be required to furnish plaintiff with good, adequate and sufficient medical, surgical and hospital care and attention during and after such confinement.

8. That the plaintiff be awarded a money judgment against said defendants in the amount of Two Hundred Fifty Thousand ($250,000.00) dollars.

HERSCHEL G. HOLLAND,
H. M. RUST.

(Verification omitted.)

INTERROGATORIES TO THE PLAINTIFF (In Part).

(Filed November 12, 1954.)

and

ANSWERS THERETO.

(Filed December 31, 1954).

Interrogatory No. 2:

(B) State specifically in what manner and in what respect or respects said act or acts interfered with or involved said right or rights to:

(5) hold real and personal property.

(C) State the time and place where said act or acts were done.

INTERROGATORY #2.

(B) 5. By forcibly withholding him from being with his family, by forcibly searching and shaking down his person and taking his property, and by failing to give him police protection against injury and infection of his body, and by not having the Mansfield City Prison in charge of a responsible person, a station-keeper.

(C) In the Mansfield City Prison, located in the City of Mansfield, on November 6, and 7, 1950, and on the respective dates the trials were held.

Interrogatory No. 3:

(A) State specifically what act or acts of defendant Glenn W. Marriott interfered with you in any right or rights enjoyed by white citizens of the State of Ohio to:

(5) hold real and personal property.

(C) State the time and place where said act or acts were done.

INTERROGATORY #3.

(A) 5. Considering my physical body as personal property, he advised and instructed the police to strike, abuse and beat up citizens of the United States that they have in their custody, of which this plaintiff was one, and of which treatment he approved of in his statement to the jury and which he had published in the Mansfield News Journal. In trying and convicting this plaintiff without due process of law.

(C) I am unable to state when he commenced so advising and instructing the officers, he spoke of it as being well established course of conduct, when he so informed the jury on the last day of trial, he had it reported in the Mansfield News Journal, a daily newspaper, shortly after that.

Interrogatory No. 5:

State by what fact, reason or reasons, you claim that Section 200 of the Ordinances of the City of Mansfield does not comply with delegation of power to municipalities provided in the General Code of Ohio, and is beyond the scope of powers delegated to municipal corporations.

INTERROGATORY #5.

By condemning conduct which the statute permits, the statute is limited to the night season, and to conduct set forth therein, in the streets and other public places to

the annoyance of the Citizens, these matters are not contained in the ordinance, and the statute and ordinance are in conflict.

Interrogatory No. 6:

State in what respect or respects you claim said ordinance to be vague and uncertain and of no determinative meaning.

INTERROGATORY #6.

The ordinance forbids that which is unusual and unnecessary, without defining the same or setting up any standards by which this can be determined by the citizen, this is left to the whim and caprice of the complainant subject to the whim and caprice and concurrence of the complainant's judgment by the Court. This ordinance appears to be for the purpose of suppressing noise, and does not give the citizen any notice as to what conduct of his is permitted or forbidden, drunken behavior is a term not known to the common law, or defined by statute in Ohio, or by the ordinances of Mansfield. It does not state or define any conduct.

Interrogatory No. 11:

(A) State whether or not you requested medical attention while confined in the Mansfield City Prison on the occasion described in the complaint herein.

(B) If the answer to (A) above is in the affirmative, state when and to whom you made the request or demand and whether or not it was granted.

INTERROGATORY #11.

(A) Yes.

(B) I asked Varga twice before I was put in the cell and refused. After I was put in the cell, Varga came to cell three times and looked at me, and I asked him three times to get a doctor or take me to the hospital, he refused me.

Interrogatory No. 12:

State by what fact, reason, reasons, or authority you claim that the affidavit filed in the Mansfield Municipal Court by the defendant Edward G. Varga does not set forth any facts constituting a crime.

INTERROGATORY #12.

It does not set forth any conduct of this plaintiff forbidden by law, or that it was in the night season, a public place or to the annoyance of citizens, and did not give notice of any conduct forbidden so as to be due process of law upon which a warrant could be issued.

Interrogatory No. 13:

State precisely by what fact, reason, reasons or authority you claim that the action of Judge Glenn W. Marriott in ordering a jury impaneled violated the statutes of the State of Ohio.

INTERROGATORY #13.

The statute requires juries to be chosen and summoned in accordance with a rule of the Court, rule ten of the Court the judge to write in a panel the names of 18 electors in the city of Mansfield or Township of Madison and file the same with the Clerk. The order of the Court was to impanel a jury from Richland County, rule or rules of the Court to the contrary notwithstanding, and contained persons not qualified to set on the jury, and who were permitted to set on the jury. The jury should have been drawn according to the state statute G. C. 13443.

Interrogatory No. 14:

(A) State where, when, how, and under what circumstances the juries were challenged as not being lawful juries.

(B) State whether or not said challenge was in writing.

(C) State whether or not it was over-ruled.

(D) State whether a written record was made at the proceedings, and, if so, whether said record discloses your challenge and/or objection.

INTERROGATORY #14.

Before the jury were seated on the day of trial, by a challenge to the array of jurors, in writing filed before the trial, it was over-ruled, a written record was made at the proceedings and shows part of the challenge and objection.

Interrogatory No. 18:

State precisely the fact, reason, reasons or authority by which you claim that Judge Glenn W. Marriott was without jurisdiction in the premises to try you on the charge as set forth in the complaint.

INTERROGATORY #18.

Glenn W. Marriott was not a fair and impartial judge, he did not have any return of summons or warrant, and instead of arraigning me according to law, he berated me for pleading not guilty, told me that a lawyer could do me no good, and that I would never win a case in his court as long as he was the judge. In proceeding upon a void affidavit not stating any offense, under a void ordinance, with an illegal jury, which was then denied me, by usurping their functions with the opinions of witnesses as to the guilt of this plaintiff, by not charging the jury with the necessary and correct law, his remarks to the jury after their return as to the defense being fantastic, and his approval of the brutality of the officers and his advice to them in the past that they were to continue it. In assessing a penalty many times that usually assessed.

In proceeding in a misdemeanor when the state of Ohio, by its constitution, statutes and the interpretation and application of them by the courts with the approval and judgment of the court of last resort, does not furnish a citizen of the United States with due process of law, in misdemeanor cases. The authority for this is the 14th Amendment.

Interrogatory No. 20:

If you claim to be a citizen of the United States,

(A) State specifically how, where, and when you were deprived of any rights, liberty, privileges and immunities secured to you by the Constitution and laws of the United States as a citizen thereof; and

(B) Name specifically the rights, liberty, privileges and immunities secured to you by the Constitution and laws of the United States of which you were deprived; and

(C) State specifically the time and place you were deprived of said rights, liberty, privileges and immunities.

INTERROGATORY #20.

(A) On the streets of Mansfield, Ohio, and at the Mansfield City Prison, on November 6th and 7th, 1950, and in the Municipal Court of Mansfield, Ohio on the days of my trial therein.

(B) My right to have and enjoy my property, including my marital and parental rights, time lost from my employment, my rights to due process of law, my right to liberty.

(C) On November 6th and 7th, 1950 and on the days of the trials, on the streets of Mansfield, Ohio, in its City Prison and in its Municipal Court.

LESLIE R. ULRICH, of
JAMISON, ULRICH, HOPE, JOHNSON & BURT.

ROBERT E. MABEE,
LYDON H. BEAM, of
BEAM AND BEAM,

Attorneys for Defendants

(Answers verified by Frank Cuiksa.)

DEPOSITION OF FRANK CUIKSA.

(Filed June 23, 1955.)

* * * * *

(50) Q9. Then you were taken to the Mansfield police station were you? (51) A. Yes.

Q1. And what was done when you first arrived? A. They took me out of the cruiser, they took me in a hallway and searched me down, took all my belongings out of me and—

Q2. Interrupting—Did they give you a receipt? A. No.

Q3. You got them back? A. Yes, sir.

Q4. Then you were put in the bullpen? A. Right, I was shoved in the bullpen.

Q5. And were you beat or struck after you arrived at the police station? A. You mean after I was put in behind the cell?

Q6. After you arrived at the police station? A. Yes.

Q7. Who did that? A. Harper and O'Niel and Varga pushed me from one of the corners like a basketball.

Q8. Did they strike you? A. They was pushing me.

Q9. Did they strike you? A. They bounced me against the side of the wall.

Q10. Did they hit you? A. Right, they pushed me with their hand, just like me pushing you against the chest like that.

Q11. Did it hurt you any? A. Sure.

Q12. At the time or later on? A. It hurt me at the time and later on.

(52) Q1. Both? A. That is right.

Q2. Did they hit you with their fist? A. They hit me with their hand.

Q3. But not with their fist, with their open hand was it? A. That is right.

Q4. And then they put you in the bullpen did they? A. Yes.

Q5. And when did you next leave there? A. The next morning they took me out, they took me up to the courtroom.

Q6. And that was in front of Judge Marriott? A. Yes.

Q7. What was done up there? A. I went up to the courtroom and stood in the row and when the time came to make my conviction they asked what I was tried for, Varga told them for drunk and I told the Judge then, I said "I want you to look, you see the side of my face how it is skinned up, I am not drunk, the policeman beat me up." The Judge said, "you will have to plead guilty, lawyer or anybody else won't do you any good as long as I am a Judge to sue the case" and that was it. Everybody that was locked up in the bullpen with me that same night heard it.

* * * * *

MOTION OF DEFENDANT THE CITY OF MANSFIELD FOR SUMMARY JUDGMENT UNDER RULE 56.

(Filed September 7, 1956.)

The defendant the City of Mansfield severally moves the Court under Rule 56 of the Federal Rules of Civil Procedure to enter judgment in its favor on the ground that it is entitled to judgment as a matter of law and that there is no genuine issue as to any material fact in this action, as appears from the pleadings and the deposition of the plaintiff filed herein.

LESLIE R. ULRICH, OF
JAMISON, ULRICH, HOPE, JOHNSON & BURT,
ROBERT E. MABEE,
LYDON H. BEAM OF
BEAM AND BEAM,

Attorneys for Defendant the City of Mansfield.

(A like motion was filed on the same date by defendant Glenn W. Marriott.)

ORDER DISMISSING COMPLAINT.

(Filed February 6, 1957.)

Upon consideration,

IT IS ORDERED that the motions of Defendants Glenn W. Marriott and The City of Mansfield for summary judgment are hereby granted.

IT IS THEREFORE, ORDERED that the complaint herein is hereby dismissed as to Defendants Glenn W. Marriott and The City of Mansfield.

JAMES C. CONNELL,
United States District Judge.

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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 849

FRANK CUIKSA, *Petitioner*,

v.

THE CITY OF MANSFIELD, *et al.*, *Respondents*.

CLARK DENNY HERTZLER, *Petitioner*,

v.

THE CITY OF MANSFIELD and
GLEN W. MARRIOTT, *Respondents*.

FRANK L. SMITH, *Petitioner*,

v.

THE VILLAGE OF BUTLER, ROBERT E. HARRIS and
RONALD THOMPSON, *Respondents*.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

LEO F. LIGHTNER,
JAMES S. BROCARD,
717 National Press Building,
Washington 4, D. C.,
Attorneys for Petitioners.

(Other Counsel on Inside of Cover.)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8647

Of Counsel:

H. M. RUST,

Richland Trust Building,
Mansfield, Ohio,

RALPH E. JOHNS,

506 Walpark Building,
Mansfield, Ohio,

CLIFFORD BROWN,

20 West Main Street,
Norwalk, Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. _____

Miscellaneous Docket.

FRANK CUIKSA, *Petitioner,*

v.

THE CITY OF MANSFIELD, *et al., Respondents.*

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v.

THE VILLAGE OF BUTLER, ROBERT E. HARRIS and
RONALD THOMPSON, *Respondents.*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Judges of the Supreme Court of the United States:

Frank Cuiksa, Clark Denny Hertzler, and Frank L. Smith, petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the United States

Court of Appeals for the Sixth Circuit entered on December 20, 1957 insofar as the said judgment affirmed the judgments of the United States District Court for the Northern District of Ohio, Eastern Division in three (3) separate cases involving the aforesaid petitioners.

OPINIONS BELOW.

Since the three (3) cases involved similar factual situations and the same questions of law, they were argued together on separate records. However, they were discussed jointly in one opinion of the Court of Appeals (App. 1a),* which was unanimous in its holding and which is reported at ____ F. 2d ____ (C. A. 6th Circuit, December 20, 1957).

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254 (1).

QUESTIONS PRESENTED.

Is a municipality, under the provisions of 42 U. S. C. A., Section 1983, liable for depriving an individual of rights, privileges, or immunities secured by the Constitution and laws of the United States?

Is a judge, under the provisions of 42 U. S. C. A., Section 1983, liable for depriving an individual of rights, privileges or immunities secured by the Constitution and laws of the United States?

Is a state executive officer (a village constable) under the provisions of 42 U. S. C. A., Section 1983, liable for

---

* "App." references herein are to the Appendix to this petition.

depriving an individual of rights, privileges or immunities secured by the Constitution and laws of the United States?

STATUTES INVOLVED.

The provisions of the Civil Rights Act, 28 U. S. C. A., Section 1343 (3) and 42 U. S. C. A., Section 1983, are printed in the Appendix, *infra*, at page 9a.

AMENDMENT INVOLVED.

The pertinent provisions of the Fourteenth Amendment of the United States Constitution is printed in the Appendix, *infra*, at page 9a.

ARTICLE INVOLVED.

The pertinent provision of Article VI, Clauses 2 and 3, of the United States Constitution is printed in the Appendix, *infra*, at pages 9a-10a.

STATEMENT OF THE CASE.

Although the three (3) cases represented in this petition for certiorari were heard together below and were consequently discussed jointly in one opinion (App. 1a), the facts will be discussed separately here. In each case the petitioners sued in the United States District Court for the Northern District of Ohio, Eastern Division, under the provisions of the Civil Rights Act, Section 1343, Title 28, of the United States Code Annotated, and Section 1983 of Title 42, of the United States Code Annotated, claiming substantial damages by reason of alleged deprivation of rights and privileges secured by the Constitution by the respondents acting under color of a statute or ordinance. The three (3) respective complaints alleged arbitrary,

whimsical, capricious and illegal action on the part of the city or village in which the court was situated and on the part of the judicial officer trying the case, and of the police officers.

In case No. 13,219, the facts are as follows:

On November 6, 1950, the petitioner, Frank Cuiksa, was arrested without a warrant by four (4) police officers of the City of Mansfield, Ohio, who charged him—under the provisions of a void ordinance—with the crime of drunken behavior, a claimed misdemeanor, not committed in their presence. At the time of his arrest, the petitioner was beaten and tortured and subsequently removed to the Mansfield City Prison—a place unfit for human occupancy—before being brought before a magistrate. While incarcerated, the petitioner's demands for a doctor to tend his injuries were completely ignored. On the following day (November 7, 1950), the petitioner was brought before the respondent, Glen W. Marriott, the Judge of the Municipal Court of Mansfield, on a void affidavit which did not set forth any facts constituting a crime and without process or notice of the charge. At this time, the respondent, the said Judge Marriott, berated the petitioner for not pleading guilty and informed him that a lawyer would do him no good and that he would never win a case in his court so long as he was the judge. Without regard to fair play, a jury was illegally impanelled, and after two (2) jury trials and four (4) days of trial—where, among other irregular proceedings, there was no basic adherence to the rules of evidence and witnesses were permitted to give their opinions as to the guilt of the petitioner—the petitioner was convicted of disturbing the peace and good

order of the city by drunken behavior and fined the sum of fifty dollars ($50.00) and costs. The conviction was affirmed by the Ohio Court of Appeals. The petitioner, thereafter, brought this action for $250,000.00 damages against the city and the judge, the respondents herein, and the four (4) police officers. Motions for summary judgment by the city and the judge were granted by the District Court, from which ruling an appeal was taken. The Court of Appeals for the Sixth Circuit affirmed. As of the time of the filing of this petition, the case is still pending in the District Court against the four (4) police officers.

In case No. 13,220, the facts are as follows:

At about 3:00 a.m. on the morning of October 26, 1952, the petitioner, Clark Denny Hertzler, was having a cup of coffee and conducting an orderly conversation with friends in a lunchroom when Marion L. Hardesty, a member of the Mansfield Police Department—without any just cause or excuse—took hold of him and forcibly took him to a police call box. As soon as the said respondent completed his call, he turned to the petitioner and, with a blackjack, proceeded to strike him repeatedly over the head and body. At no time did the petitioner act in a disorderly manner or resist an arrest or in any way interfere with what the officer may have thought was his duty. Several citizens who had gathered as a result of the commotion created by the conduct of the police officer protested the violent and wanton beating of the petitioner, at which time they were held off with a police club while the said officer continued to beat the petitioner, permanently injuring him. Shortly thereafter, the petitioner

was put in a police cruiser with three (3) additional policemen of the Mansfield Police Department, who, while driving the petitioner to the Mansfield City Prison—a place unfit for human occupancy—abused, insulted and mistreated him. During the time of his incarceration, the petitioner was not only denied medical attention for his injuries but he was forbidden to see his wife, who had called at the prison to inquire about his detention and welfare. The next day (October 27, 1952), the petitioner was brought before the respondent, Glen W. Marriott, the Judge of the Municipal Court of Mansfield, and charged with the crimes of disorderly conduct and resisting a police officer. Without regard to fair play, the respondent, the said Judge Glen W. Marriott, proceeded to try the petitioner without any process or notice of the charges, before an illegally impanelled jury where, among other irregular proceedings, there was no basic adherence to the rules of evidence and witnesses were permitted to give their opinions as to the guilt of the petitioner. The jury found the petitioner not guilty of disorderly conduct but guilty of resisting a police officer. The conviction was reversed by the Common Pleas Court. However, the reversal was set aside by the Court of Appeals. The petitioner thereafter brought this action of $250,000.00 damages against the city, the judge of the Municipal Court, four (4) police officers, and the proprietor of the lunchroom. Motions for summary judgment by the city and the judge were granted by the District Court, from which ruling an appeal was taken. The Court of Appeals for the Sixth Circuit affirmed. The complaint was dismissed as to the lunchroom proprietor, but as of the time of the filing of this petition, the case is still pending in the District Court against the police officers.

In Case No. 13,228, the facts are as follows:

On October 8, 1952 the petitioner, Frank L. Smith, was stopped and warned by the respondent, Ronald Thompson, a constable of the Village of Butler, a municipality of the State of Ohio, about the manner in which he was operating his automobile. On October 13, 1952, the said constable filed an affidavit charging the petitioner for passing on the right, a minor traffic violation. Although there was no village ordinance making that an offense, the respondent, Robert E. Harris, the mayor and ex-officio judge, thought there was and tried him under that theory without any process or notice of the charge. The petitioner was found guilty and fined the sum of $20.00 and costs, which he paid. After learning that there was no such ordinance, but that there was an Ohio statute which made such an act an offense, the mayor vacated the judgment under the ordinance but ordered the petitioner to appear and answer a charge of violating the State statute. He ordered a recognizance of $25.00 for his appearance and advised petitioner's counsel that he would consider the fine and costs paid as the recognizance but to inform him if the attorney desired otherwise. No new trial was ever had. The conviction remains set aside. The petitioner, thereafter, brought this action for $200,000.00 damages against the village, the Mayor and ex-officio Judge of the Mayor's Court, and the constable who executed the affidavit charging the petitioner with passing on the right. Motions for summary judgment by the three (3) respondents were granted by the District Court, from which ruling this appeal was taken. The Court of Appeals for the Sixth Circuit affirmed.

ARGUMENT.

The three (3) questions involved herein will be discussed jointly, and the reasons, except where otherwise noted, are to be applied to each question with equal force and effect.

The petition for a writ of certiorari should be granted because the decision of the Court of Appeals for the Sixth Circuit in affirming the judgment of the United States District Court for the Northern District of Ohio, Eastern Division, raises three (3) important questions of federal law involving the interpretation to be given the language of the Civil Rights Act, 42 U. S. C. A., Section 1983, as applied to the principles of immunity inuring to judges, municipalities and public officials in the exercise of their prescribed and official duties.

This Court has held under the "Commerce Clause" that when a state violates the law of the United States, it is unimportant whether it acted in a governmental or private capacity, if it is a person within coverage of the law, it is liable, and can claim no common law or sovereign immunity. *U. S. vs. California*, 297 U. S. 175. The prohibition of a federal statute may not be set aside or its benefits denied, by state common law rules. *Sola Electric Co. vs. Jefferson Electric Co.*, 317 U. S. 173.

It also involves the effect to be given this Court's holding in *Tenney v. Brandhove*, 341 U. S. 367. In addition, the decision is directly in conflict with the case of *Picking v. Penn. R. Co.*, 3 Cir., 151 F. 2d 240, rehearing denied, 152 F. 2d 753, which held that Congress by enacting the Civil Rights Act abrogated the common law immunity of a judicial officer for acts done in the performance of his judicial function. Also, there appears to be some additional confusion among our Circuit Courts as to whether

or not a complaint, alleging as required, violations of the Civil Rights Act, states a cause of action, this under the theory that state common law immunity is the Supreme Law of the Land, which can not be affected by Congress acting within the scope of the "Constitutional Plan" of government.

The common law right of procedural due process of law, of persons accused of crime, as is guaranteed by the Constitution of the United States, is not recognized by the courts of Ohio, only state statutory rights. *State of Ohio vs. Whitmore,* 126 O. S. 381, Syl. 5. The accused person is without remedy by which he can have this Court determine his federal questions, unless the remedy provided by Congress in Section 1983 of Title 42 is available to him and enforcible.

The Court of Appeals denies this remedy. At the close of its opinion, it states "What remedies the plaintiffs have, or should have, is not the question presented by these cases. On the records before us, we think it clear that they are not entitled to the remedy sought by the present actions." It appears to be the view of the Court of Appeals that state common law immunity completely emasculates the statute and renders it nugatory.

In its opinion, the Court of Appeals agreed with the petitioners in that the respective complaints "charged highly irregular proceedings which, if true, might well be found to constitute a denial of due process of law" and that "such alleged arbitrary and irregular proceedings should not be allowed to exist in any of the courts of this country."

The petitioners concede that at common law, a judge who had jurisdiction over the subject matter of the case and over the persons before him was not liable for damages because of an erroneous decision, or even for a de-

cision rendered maliciously and in bad faith. *Bradley v. Fisher*, 13 Wall. 335, 80 U. S. 335. However, it is common knowledge that the Civil Rights Statutes, which were passed immediately after the Civil War, were enacted to supplement and enforce the provisions of the Fourteenth Amendment. The language of the Act (Section 1983, *supra*) is very broad and unqualified. There is nothing in the Act itself or its legislative history to suggest that judges, police officers, mayors, and other public officials were to be exempt from its provisions. The language is all inclusive and embraces "every person" who under color of any law subjects any person to the deprivation of any rights secured by the Constitution and laws of the United States. It follows, therefore, that a close reading of the Act leads one to the compelling conclusion that Congress intended to abrogate the doctrine of immunity of judicial officers as well as of all other public officials and municipalities from civil actions. *Picking v. Penn. R. Co., supra.* Moreover, it is reasonable to presume that Congress knew or must have known of these principles at the time it enacted the Act, and it does seem—in view of the broad and sweeping nature of the language—that if it did not intend to abrogate these well established and deeply rooted principles, it would have said so in clear terms—either in the law or in its legislative history.

In the instant case, the Court of Appeals relied heavily on the decision in *Tenney v. Brandhove, supra*, which it regarded as controlling. In that case, this Court, in holding that the complaint did not state a cause of action, ruled that members of a legislative committee of the State of California who were acting within the sphere of legitimate legislative activity were immune from civil liability and that Congress, in enacting the Civil Rights Act, did not intend to abrogate this immunity. The petitioners

submit that this case is not pertinent for the reason that members of a legislative committee act in a field of permanent immunity from substantial liability which is derived from Article I, Section 6, Clause 1, of the U. S. Constitution. Consequently, no assumption would follow that Congress has constitutional power to limit the freedom of state legislators acting within their traditional sphere. *Tenney v. Brandhove, supra,* at page 376. There is no such constitutional immunity for the acts of judicial officers, public officials and the like. Hence, the conclusion is inescapable that Congress, by enacting the Civil Rights Act, intended to supersede the common law principles of immunity to the extent indicated by the Act and in fact did so.

As recently as in 1951, this Court—in the case of *Williams v. U. S.*, 341 U. S. 97—had occasion to construe the provisions of 18 U. S. C. A., Section 242, which is the criminal counterpart of the Civil Rights Act. The pertinent part of Section 242 reads as follows:

> "Whoever under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States * * *, shall be fined not more than $1,000, or imprisoned not more than one year, or both."

In upholding the constitutionality of Section 242, the Court held, in a 5-4 opinion, that a special police officer, who, acting under color of State law, obtains a confession from a suspect by force and violence, may be held criminally liable for depriving a person of his civil rights.

Consequently, it would appear to the petitioners that, if this Court upholds the criminal prosecution of one,

under the foregoing circumstances, for the violation of the criminal counterpart of the Civil Rights Act, then it would necessarily follow that a person who has sustained the deprivation of his necessary rights civilly could seek redress under the provisions of the Civil Rights Act.

CONCLUSION.

For the foregoing reasons, the petitioners pray that a writ of certiorari be issued to the Court of Appeals for the Sixth Circuit to review its judgment herein.

LEO F. LIGHTNER,
JAMES S. BROCARD,
717 National Press Building,
Washington 4, D. C.,
Attorneys for Petitioners.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided December 20, 1957.)

Before: ALLEN, McALLISTER and MILLER, Circuit Judges.

MILLER, Circuit Judge. These three appeals, involving similar factual situations and the same questions of law, were heard together on separate records. They will be discussed jointly in this one opinion.

In each case the plaintiff brought suit in the United States District Court under the Civil Rights Act, Section 1983, Title 42, U. S. Code; Section 1343, Title 28, U. S. Code, claiming substantial damages by reason of alleged deprivation of rights and privileges secured by the Constitution by the defendants acting under color of a statute or ordinance.

In case No. 13,219, appellant was convicted in the Municipal Court of the city of Mansfield, Ohio, after a jury trial of disturbing the peace and good order of the city by drunken behavior, in violation of an ordinance of the city and fined $50.00. The conviction was affirmed by the Ohio Court of Appeals. The appellant thereafter brought this action for $250,000 damages against the city, the judge of the Municipal Court, and four police officers. Motions for summary judgment by the city and the judge were granted by the District Court, from which ruling an appeal was taken. The case is still pending in the lower court as to the four police officers.

In case No. 13,220, appellant was tried before a jury in the Municipal Court of the city of Mansfield, Ohio, for disorderly conduct and resisting a police officer. The jury found him not guilty on the first charge and guilty

on the second. The conviction was reversed by the Common Pleas Court. The reversal was subsequently set aside by the Court of Appeals. This action was brought by the appellant for $250,000.00 damages against the city, the judge of the Municipal Court, four police officers, and the proprietor of a lunchroom. Motions for summary judgment by the city and the judge were granted by the District Court, from which ruling an appeal was taken. The complaint was dismissed as to the lunchroom proprietor, but is still pending in the lower court against the police officers.

In case No. 13,228, the appellant was tried in the Mayor's Court of the village of Butler, Ohio, for a minor traffic violation of passing on the right. There was no village ordinance making that an offense, although the Mayor, as ex-officio judge, thought there was and tried him under that theory. He was found guilty and fined $20.00 and costs, which he paid. After learning that there was no such ordinance, but that there was an Ohio statute which made such an act an offense, the Mayor vacated the judgment under the ordinance but ordered the appellant to appear and answer a charge of violating the State statute. He ordered a recognizance of $25.00 for his appearance and advised appellant's counsel that he would consider the fine and costs paid as the recognizance but to inform him if the attorney desired otherwise. No new trial was ever held. The conviction remains set aside. The appellant brought this action for $200,000.00 damages against the village, the Mayor and ex-officio Judge of the Mayor's Court and the constable who executed the affidavit charging appellant with passing on the right. Motions for summary judgment by the three defendants were granted by the District Judge, from which ruling an appeal was taken.

The respective complaints alleged arbitrary, whimsical, capricious and illegal action on the part of the city or village in which the court was situated and on the part of the judicial officer trying the case. In view of the disposition which we make of the cases, it is unnecessary to go into the details of the respective trials. It is sufficient to say that the complaints charged highly irregular proceedings which, if true, might well be found to constitute a denial of due process of law. We agree with the appellants that such alleged arbitrary and irregular procedure should not be allowed to exist in any of the courts of this country. However, the allegations were denied by the defendants and since the cases were disposed of as a matter of law on motions for summary judgment, there was no trial or findings on the factual issues on that aspect of the cases. Whether such arbitrary and irregular procedure took place and, if so, how it should be corrected, is not the question before us. We are restricted on these appeals to a consideration of the correctness as a matter of law of the granting of the motions for summary judgment.

The District Judge sustained the motions for summary judgment on the authority of our ruling in *Kenney v. Fox*, 232 F. (2d) 288, C. A. 6th, cert. denied, 352 U. S. 855, 856, from which rulings these appeals were separately prosecuted.

In *Kenney v. Fox, supra*, we held, upon the authority of *Bradley v. Fisher*, 13 Wall. 335, and numerous other cases referred to in the opinion, that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts where jurisdiction exists over the subject-matter and the defendant, even though such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly; that some of

the most difficult questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised; that the manner and extent in which the jurisdiction is exercised are generally as much questions for the determination of the judge as other questions involved in the case, although upon the correctness of his determination in these particulars the validity of the judgment may depend; that against the consequence of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort; that for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed; that such a rule is necessary as a matter of public policy for the protection of judges against disappointed litigants who, in attempting to seek redress through civil action against a judge who has decided a case against them, could always include in their complaint allegations of malicious or corrupt motives.

As shown by the cases referred to in that opinion, this principle of law is of ancient origin and well settled, and was not abrogated or modified by the passage of the Civil Rights Act. In our opinion, this is the necessary conclusion to be drawn from the recent opinion of the Supreme Court in *Tenney v. Brandhove*, 341 U. S. 367, which we regard as controlling on this issue. Appellants rely chiefly upon *Picking v. Penn. R. Co.*, 151 F. (2d) 240, C. A. 3rd, and *McShane v. Moldovan*, 172 F. (2d) 1016, C. A. 6th. It is sufficient to say that these cases were care-

fully considered by us in *Kenney v. Fox, supra,* wherein we pointed out that the ruling in the *Picking* case was prior to the decision of the Supreme Court in *Tenney v. Brandhove, supra,* was contrary to the great weight of authority and was not being followed by us. We also pointed out that the ruling in the *McShane* case did not involve the question of judicial immunity and, in any event, must yield to the later ruling of the Supreme Court in *Tenney v. Brandhove, supra.*

Appellants, however, contend that the ruling in *Kenney v. Fox, supra,* is not applicable because the alleged deprivation of rights occurred there in a civil proceeding, while in the present case it arises out of a criminal proceeding. No authority is cited for this claimed distinction. Although the point apparently was not expressly raised, in the following cases we applied the ruling in *Kenney v. Fox, supra,* to cases arising out of criminal proceedings. *Watson v. Skillman, et al.,* 234 F. (2d) 659, C. A. 6th, *Copley v. Sweet, et al.,* 234 F. (2d) 660, C. A. 6th; *Thompson v. Heither, et al.,* 235 F. (2d) 176, C. A. 6th. In addition, we believe the matter was settled for the present purposes by the following statement of the Supreme Court in *Bradley v. Fisher, supra,* 13 Wall. 335, 352, "But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for

his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked."

It is equally well settled that governmental immunity exists with respect to the municipality, City of Mansfield and Village of Butler, in their governmental functions, which has not been abrogated by the Civil Rights Act. *Cobb v. City of Malden*, 202 F. (2d) 701, 703, C. A. 1st; *Agnew v. City of Compton*, 239 F. (2d) 226, C. A. 9th, cert. denied, 353 U. S. 959; *Charlton v. City of Hialeah*, 188 F. (2d) 421, C. A. 5th; *Aldrich v. City of Youngstown*, 106 O. S. 342, *Tenney v. Brandhove, supra*, 341 U. S. 367.

In case No. 13,228, a constable of the village of Butler was also made a defendant. The constable filed an affidavit against the appellant Smith charging him with passing on the right, which initiated the prosecution. Appellant was not placed in custody by the constable or physically restrained. At the trial the constable testified as a witness. We held in *Kenney v. Fox, supra*, 232 F. (2d) 288, 290, that neither an attorney who prepared the papers initiating the prosecution, nor the prosecuting attorney who prosecuted the case, was liable for damages under the Civil Rights Act. The actions of the constable in initiating the prosecution and in testifying did not deprive the appellant of any constitutional right. Nor is he responsible for the subsequent actions and rulings of the judge. *Whittington v. Johnson*, 201 F. (2d) 810, 811-812, C. A. 5th, cert. denied, 346 U. S. 867, cited by us with approval in *Kenney v. Fox, supra*, and *Barlett v. Weimer*, 244 F. (2d) 955, C. A. 6th. Appellant Smith had no cause of action under the Civil Rights Act against the constable.

We are not unmindful of the fact that if the allegations of the respective complaints are accepted as true, each of the appellants has been convicted of a criminal offense through judicial proceedings highly irregular and

prejudicial in nature for which he seeks redress. Many of the acts and rulings of which they complain constituted proceedings which were subject to review by an appellate court, which, if found to be illegal or prejudicially erroneous, would invalidate the judgment of conviction. Insofar as any individual personal rights have been violated by reason of assault and battery, false imprisonment, slander, or other tort, the present ruling does not dispose of such claims against the individual who may have committed such tort. *Agnew v. City of Compton, supra,* 239 F. (2d) 226, 231, C. A. 9th. What remedies the plaintiffs have, or should have, is not the question presented by these cases. On the records before us, we think it is clear that they are not entitled to the remedy sought by the present actions.

The judgment in each case is affirmed.

JUDGMENT, Case No. 13,219.

(Filed December 20, 1957.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

JUDGMENT, Case No. 13,220.

(Filed December 20, 1957.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

JUDGMENT, Case No. 13,228.

(Filed December 20, 1957.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

STATUTES AND AMENDMENT INVOLVED.

28 U. S. C. A., Section 1343. Civil Rights.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

42 U. S. C. A., Section 1983, Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

United States Constitution, Fourteenth Amendment.

SECTION 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5.

The Congress shall have the power to enforce by appropriate legislation, the provisions of this article.

United States Constitution, Article VI, Clause 2, Supreme Law of Land.

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the

United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

Article VI, Clause 3, Oath of Office.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 849.

~~Miscellaneous Docket.~~

FRANK CUIKSA, *Petitioner,*

v.

THE CITY OF MANSFIELD, *et al., Respondents.*

CLARK DENNY HERTZLER, *Petitioner,*

v.

THE CITY OF MANSFIELD and
GLEN W. MARRIOTT, *Respondents.*

FRANK L. SMITH, *Petitioner,*

v.

THE VILLAGE OF BUTLER, ROBERT E. HARRIS and
RONALD THOMPSON, *Respondents.*

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

FRED O. BURKHALTER,
LESLIE R. ULRICH,
ROBERT F. LEE,
1425 National City Bank Bldg.,
Cleveland 14, Ohio,

RICHARD M. CHRISTIANSEN,
16 North Mulberry Street,
Mansfield, Ohio,

LYDON H. BEAM,
Richland Trust Bldg.,
Mansfield, Ohio,
Attorneys for Respondents.

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v.

THE VILLAGE OF BUTLER, ROBERT E. HARRIS and
RONALD THOMPSON, *Respondents.*

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The questions presented by these three petitions for certiorari is whether Congress intended to abrogate the ancient doctrines of judicial and governmental immunity in suits for damages under the Civil Rights Acts. The statute involved is 42 U. S. C. 1983, which was formerly 8 U. S. C. 43 and derived from the Act of April 20, 1871.

The three actions were filed in the United States Dis-

trict Court for the Northern District of Ohio. Each of the actions was brought against an Ohio municipal corporation, a judge of its municipal court and one or more of its police officers. Motions for summary judgments under Rule 56 were filed in each of the three cases on behalf of the municipality and of the defendant judge and in the Smith case on behalf of the constable. No motion for summary judgment was filed on behalf of any of the police officers in the Cuiksa and Hertzler cases; and the cases are still pending in the District Court as to these defendants. The motions were each based upon the ground that there was no genuine issue as to any material fact in the action as appeared from the pleadings and the plaintiff's deposition.*

The District Court granted all of the motions for summary judgment. This eliminated the City of Mansfield and the judge of the Municipal Court of Mansfield as defendants in the Cuiksa and Hertzler cases. Such rulings eliminated all three of the defendants in the Smith case, namely the Mayor of the Village of Butler, who is *ex officio* judge of its Mayor's Court, the Village of Butler and the village constable.

Upon appeal by the plaintiffs, the Sixth Circuit Court affirmed the judgments of dismissal in all three cases, regarding *Tenney v. Brandhove*, 341 U. S. 367 and its own decision in *Kenney v. Fox*, 6th Cir., 232 F. 2d 288, cert. den. in 352 U. S. 855, 856, as decisive.

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*The appellant has filed for its record herein its appendices to its briefs in the Sixth Circuit Court. The respective complaints and motions for summary judgment are printed therein at pages 3a and 15a of appellant's lower court appendix in the Cuiksa case, at page 3a of the Hertzler appendix and at pp. 3a and 9a of the Smith appendix.

The depositions of the plaintiffs in the Cuiksa and Hertzler cases disprove the claims of gross mistreatment made in their briefs herein.

The pertinent facts in the three cases may be summarized as follows:

Cuiksa Case, No. 13291.

Cuiksa was tried before a jury in the court of the defendant Judge Marriott of the Municipal Court of Mansfield upon an affidavit charging Cuiksa with "Disturbing the peace and good order of the City by drunken behavior" contrary to § 200 of the Ordinances of that City (pp. 4a, 5a of Cuiksa appendix). Cuiksa was convicted, fined $50.00 and appealed first to the Common Pleas Court and then to the Ohio Court of Appeals, each of which affirmed his conviction.

In October, 1953, Cuiksa brought the instant action in the District Court at Cleveland under the Civil Rights Act asking for $250,000 damages and unique other relief, such as furnishing the appellant "a sanitary prison" (he received no jail sentence) and vacating the state court conviction (7a-8a).

Hertzler Case, No. 13220.

Hertzler was tried before a jury in the court of the defendant Judge Marriott of the Municipal Court of Mansfield for disorderly conduct and resisting a police officer. The affidavits are set forth in the complaint. The jury found Hertzler not guilty on the first charge and guilty on the second. Hertzler appealed the conviction to the Common Pleas Court which reversed the conviction. Thereafter, upon a further appeal by the State, the Ohio

Court of Appeals set aside the reversal and remanded the case to the Common Pleas Court to pass upon additional grounds of error. The Common Pleas Court then overruled all of the assignments of error and Hertzler again appealed to the Court of Appeals which affirmed the conviction. Thereafter, Hertzler filed an appeal as of right and a motion to certify the record in the Supreme Court of Ohio. The appeal was dismissed and the motion to certify was overruled on December 18, 1957, Case No. 35395, decided two days before the decision herein of the lower court.

In October 1953 Hertzler filed this action in the District Court at Cleveland under the Civil Rights Act, praying for $250,000 in damages and that the state court criminal proceedings be set aside by the Federal court.

Smith Case, No. 13228.

Smith was tried in the Mayor's Court of the Village of Butler upon an affidavit filed by the defendant Thompson which charged that Smith "unlawfully passed said Ronald Thompson on the right hand side at the intersection of Main and Elm Street, State Route 97 and 95" on October 8, 1952. Section 6309-27(a) of the Ohio General Code (now § 4511.27, Ohio Rev. Code) made it unlawful for the operator of a motor vehicle to overtake and pass another vehicle on the right, as Smith had done. The affidavit thus charged Smith with doing what was an offense under the Ohio statutes.

Many Ohio municipalities enact traffic ordinances which are local counterparts of State traffic statutes.

The defendant Mayor Harris, mistakenly believing that the Village of Butler had a local counterpart of the state passing-on-the-right statute, found Smith guilty of the

offense but entered the conviction as one under a village ordinance. Thereafter, upon ascertaining that the village had no such ordinance, Mayor Harris promptly vacated the judgment of conviction under the ordinance but ordered Smith to appear on December 4, 1952 to answer a charge of violating the State statute. He further ordered Smith to enter into a recognizance of $25.00 for his appearance. He advised Smith's counsel that, to accommodate them, he would consider the fine of $20.00 and costs of $4.10 as a recognizance but to inform him if the attorney desired otherwise.

Nothing further has ever happened in the case and the conviction remains set aside.

In October, 1953, Smith brought the instant action in the District Court at Cleveland under the Civil Rights Act, asking for $200,000 damages.

ARGUMENT.

The decision of the Court in *Tenney v. Brandhove*, 341 U. S. 367, has been regarded by all of the Circuit Courts passing upon the question as being decisive against the petitioners' contention that Congress intended to abrogate judicial and governmental immunity in suits for damages under the Civil Rights Act, 42 U. S. Code 1983. In the *Tenney* case, the Court held that the aforesaid § 1983, then 8 U. S. C. 43, did not abrogate the doctrine of legislative immunity in the case of a committee of the California legislature. Mr. Justice Frankfurter stated (p. 376):

> "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National

> Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of §§ 1 and 2 of the 1871 statute—now §§ 43 and 47(3) of Title 8—were not spelled out in debate. We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."

Since the *Tenney* decision, the Circuit Courts passing upon the question have uniformly held that the doctrines of judicial immunity and governmental immunity are just as deep-rooted and essential as the doctrine of legislative immunity and were likewise not intended by Congress to be abrogated in suits under the Civil Rights Act. The First, Second, Sixth, Seventh, Eighth, Ninth and Tenth Circuits have so held in the following cases:

First Circuit:

Francis v. Crafts, 1 Cir., 203 F. 2d 809, 811, cert. den. 346 U. S. 835;
Cobb v. City of Malden, 202 F. 2d 701;
Francis v. Lyman, 1 Cir., 216 F. 2d 583;
Handy Cafe v. Justices of the Superior Court, 1 Cir., 248 F. 2d 485.

Second Circuit:

Miller v. Director, Middletown State Hospital, 2 Cir., 243 F. 2d 527, aff'g. an opinion of lower court in 146 F. Supp. 674, S. D. N. Y.;

Morgan v. Sylvester, 2 Cir., 220 F. 2d 758, aff'g. 125 F. Supp. 380, cert. den. 350 U. S. 867.

Sixth Circuit:

Kenney v. Fox, 6 Cir., 232 F. 2d 288, cert. den., 352 U. S. 855 and 856;

Watson v. Skillman, 6 Cir., 234 F. 2d 659, cert. den., 352 U. S. 974;

Copley v. Sweet, 6 Cir., 234 F. 2d 660, cert. den., 352 U. S. 887;

Tankard v. O'Hara, 6 Cir., 234 F. 2d 661;

Grubbs v. Farnsley, 6 Cir., 234 F. 2d 666, cert. den., 352 U. S. 894;

Thomson v. Heither, 6 Cir., 235 F. 2d 176, appeal dismissed 352 U. S. 921;

Hicks v. Holland, 6 Cir., 235 F. 2d 183, cert. den. 352 U. S. 855.

Seventh Circuit:

Cawley v. Warren, 7 Cir., 216 F. 2d 74;

Peckham v. Scanlon, 7 Cir., 241 F. 2d 761;

Jennings v. Nester, 7 Cir., 217 F. 2d 153, cert. den. 349 U. S. 958.

Eighth Circuit:

Tate v. Arnold, 8 Cir., 223 F. 2d 782;

Moffett v. Commerce Trust Co., 8 Cir., 187 F. 2d 242, cert. den. 342 U. S. 818, reh. den. in 342 U. S. 879, and 343 U. S. 989.

Ninth Circuit:

Holmes v. Henderson, 9 Cir., 249 F. 2d 529.

Tenth Circuit:

Ryan v. Scoggin, 10 Cir., 245 F. 2d 54.

We know of no pertinent decision in the Fourth or Fifth Circuits.

Appellants state that the decision of the Sixth Circuit Court herein is in conflict with the decision of the Third Circuit in *Picking v. Penn. R. Co.*, 3 Cir., 151 F. 2d 240, wherein the court took the view that Congress had intended to abrogate judicial immunity in Civil Rights Act suits. However, the *Picking* case, upon which the petitioners evidently relied when they filed the instant cases, was decided prior to the *Tenney* decision. Two other Circuit Courts have expressed doubt that the *Picking* construction is binding any longer in the Third Circuit, *Francis v. Crafts*, 1 Cir., 203 F. 2d 809, at 812, and *Tate v. Arnold*, 8 Cir., 223 F. 2d 782, at 785. The latter case points out, with citations from District Courts in the Third Circuit, that such District Courts have held "that the decision in the *Picking* case is no longer binding on that circuit." (223 F. 2d, at 785). The Third Circuit Court has itself twice declined opportunities to state whether it regarded its decision in the *Picking* case as overruled by *Tenney v. Brandhove*. These opportunities were in *Ginsburg v. Stern*, 3 Cir., 225 F. 2d 245 and 242 F. 2d 379, being suits for damages under the Civil Rights Act against the Chief Justice and the Associate Justices of the Supreme Court of Pennsylvania. In each instance, however, the Third Circuit Court, sitting in banc, expressly refrained from passing upon the question.

The point we make from the above citations is that the decision of the Sixth Circuit Court herein is in harmony with the decision of this Court in *Tenney v. Brandhove* and is not in conflict, within the meaning of Rule 19(b) of this Court, with the decision of any other Court of Appeals on the same matter, as suggested by the petitioners.

The scope of the doctrine of judicial immunity is well established by decisions of this Court. *Bradley v. Fisher*, 13 Wall. 335, 347; *Alzua v. Johnson*, 231 U. S. 106, 111. See also *Yaselli v. Goff*, 2 Cir., 12 F. 2d 396, aff'd. in 275 U. S. 503 on the authority of *Bradley v. Fisher, supra* and *Alzua v. Johnson, supra*.

The doctrine of judicial immunity has been applied to judges at all levels of the judicial system. 30A *Amer. Jur.* 43-44, Judges, § 74. In *Voll v. Steele*, 141 O. S. 293, 302, it was held that a mayor who by the Ohio statutes is judge of the Mayor's court of the village (§ 4527, Ohio Gen. Code) was "within the protection of his judicial position" and "is protected against the charge of false arrest."

The Municipal Court of Mansfield clearly had jurisdiction over the charges made against Cuiksa and Hertzler. It was provided at that time by § 1579-989, Ohio General Code, as follows:

> "*Sec. 1579-989. Jurisdiction of misdemeanors and felonies.* The municipal court [of Mansfield] shall have jurisdiction of all misdemeanors committed within the county of Richland, and all violations of the city ordinances within the city of Mansfield, of which police courts in municipalities or justices of the peace now have or may hereafter be given jurisdiction. * * *"

Likewise, in the Smith case, the Mayor of the Village of Butler had jurisdiction to try Smith for the offense of

passing on the right, whether as a violation of an ordinance or of a statute. Secs. 4535 and 4536 of the Ohio General Code then provided as follows:

> "§ 4535. *Final jurisdiction under ordinances; keeping dockets and files.* In villages, the mayor shall have final jurisdiction to hear and determine any prosecution for the violation of an ordinance of the corporation. * * *"
>
> "§ 4536. *Jurisdiction in certain state offenses; keeping dockets and files.* He [the mayor of a village] shall have final jurisdiction to hear and determine any prosecution for a misdemeanor unless the accused is, by the constitution, entitled to a trial by jury. * * *"

Thus, the charges upon which Cuiksa and Hertzler were tried in the Municipal Court of Mansfield and Smith in the Mayor's Court of the Village of Butler were within the jurisdiction of judges of those courts respectively.

It is our understanding that petitioners are contending only that as a matter of *statutory construction* the doctrine of judicial immunity is not available as a defense in a Civil Rights Act suit. We do not understand that they are contending that judicial immunity, if available as a matter of statutory construction, would for any reason peculiar to these cases not be a complete defense to the judges herein.

The rule of judicial immunity has not been avoided by the willingness of the petitioners to plead in each case, as they did, that the acts of the defendants "were wilful and malicious." In *Bradley v. Fisher*, 80 U. S. (13 Wall.) 335, Mr. Justice Field stated (p. 354):

> "The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether

the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed. 13 Wall. 354, 80 U. S. 354."

In the Smith case, the fact that the Mayor undertook to proceed to trial on the affidavit as if the offense were charged under an ordinance, which was nonexistent, instead of under the statute making such act an offense, did not deprive the Mayor of judicial immunity. On this point, in *Bradley v. Fisher, supra*, it was stated (p. 352):

"But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, * * * no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked * * *. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons."

In the Smith case, the fact that Smith appeared in Mayor Harris' court without a warrant, did not deprive

the Mayor's court of jurisdiction to try Smith. 14 *Am. Jur.* 920, Criminal Law, § 219; *Commonwealth v. Gorman*, 288 Mass. 294, 192 N. E. 618, 96 A. L. R. 977; *State v. Malvern*, 32 Wash. 7, 72 Pac. 489.

Judicial immunity is therefore a complete defense to the charges made by petitioners against the judge defendants.

So far as concerns the defendant constable in the Smith case, Thompson, the only charges made against him are that he filed the affidavit upon which Smith was tried and that he testified as a witness at the trial. Obviously such acts are within the scope of the judicial immunity doctrine and entitled to the same protection. Certainly Thompson did not "deprive" Smith "under color of law" of any right secured to Smith by the Federal Constitution when he filed an affidavit charging Smith with the commission of a traffic offense. Nor is he responsible for any subsequent error made by the judge of the court.

The reasoning in *Tenney v. Brandhove*, 341 U. S. 367, sustaining the doctrine of legislative immunity under the Civil Rights Act, is equally applicable to the preservation under the Civil Rights Act of the doctrine of governmental immunity. Four decisions by the Circuit Courts have so held, namely:

Cobb v. City of Malden, 1 Cir., 202 F. 2d 701, 703;
Hewitt v. City of Jacksonville, 5 Cir., 188 F. 2d 423, 424, cert. den. 342 U. S. 835;
Charlton v. City of Hialeah, 5 Cir., 188 F. 2d 421;
Agnew v. City of Compton, 9 Cir., 239 F. 2d 226, 230.

The doctrine of governmental immunity covers everything charged by the petitioners against the City of Mans-

field and the Village of Butler. See 38 *Am. Jur.* 316-319, Municipal Corporations, Secs. 618-620.

The existence of the doctrine of governmental immunity of municipal corporations in Ohio was reaffirmed in *Aldrich v. City of Youngstown*, 106 O. S. 342 and is reaffirmed in Sec. 3714-1, Ohio General Code, now Sec. 701.02, Ohio Revised Code.

CONCLUSION.

Cuiksa appealed his conviction to the Common Pleas Court and then to the Ohio Court of Appeals where it was affirmed. Hertzler's appeal was passed on twice by the Common Pleas Court, twice by the Ohio Court of Appeals and the Ohio Supreme Court denied his motion to certify and his appeal as of right. Smith's conviction was vacated by the Mayor's Court promptly upon ascertaining that the offense, although covered by an Ohio statute, was not covered by an ordinance as had been supposed. Clearly, none of the petitioners was denied due process of law.

In *Gryger v. Burke*, 334 U. S. 728, Mr. Justice Jackson stated (p. 731):

> "We cannot treat a mere error of state law, if one occurred as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."

As the court well stated in *Smith v. Lansing*, 7 Cir., 241 F. 2d 856 at 859:

> "If the plaintiff is entitled to maintain this suit in the Federal Courts, the doors will be open for every unsuccessful litigant in State Court proceedings to demand that the Federal Courts be arbiters of the correctness of State Court decisions and judgments."

We submit that the petition for certiorari should be denied.

Respectfully submitted,

FRED O. BURKHALTER,
LESLIE R. ULRICH,
ROBERT F. LEE,
1425 National City Bank Bldg.,
Cleveland 14, Ohio,

RICHARD M. CHRISTIANSEN,
16 North Mulberry Street,
Mansfield, Ohio,

LYDON H. BEAM,
Richland Trust Bldg.,
Mansfield, Ohio,
Attorneys for Respondents.